OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D.C.

MEMORANDUM. No. 636. Maney vs. United States of America.

This petition for certiorari is submitted with a motion for leave to proceed in forma pauperis. This record is incomplete since it contains none of the proceedings in the Circuit Court of Appeals other than the opinion of that court. A complete certified record has been sent to the Chief Justice.

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PETITION OF APPELLEE BELOW FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supreme Court of the United States

October Term, 1927.

No. .....

ANNA MARIE MANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Sirs:—

PLEASE TAKE NOTICE that upon the annexed petition of ANNA MARIE MANEY and a certified copy of the entire transcript of the record of this cause filed with the Clerk of this Court, and also the brief of the petitioner hereto annexed to be submitted on the presentation of the petition, an application will be made to the Supreme Court of the United States for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Seventh Circuit, wherein the record is now lodged to review the deter-

mination of said court rendered June 16, 1927, from which a rehearing was denied September 22, 1927, reversing the judgment of the United States District Court for the Eastern District of Wisconsin rendered April 6, 1926, the latter judgment dismissing the Government's complaint.

Dated, Milwaukee, Wis., November 30, 1927.

Yours, etc.

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Counsel for Petitioner.
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EDWIN S. MACK,
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To:

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Hon. JOHN G. SARGENT,
Attorney General of the United States,
Washington, D. C.

PETITION OF APPELLEE BELOW FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supreme Court of the United States

October Term, 1927.

No. .....

ANNA MARIE MANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Anna Marie Maney, prays for a writ of certiorari to review the determination by the Circuit Court of Appeals for the Second Circuit, whereby the judgment of the District Court for the Eastern District of Wisconsin in this matter was reversed, in a decision presenting questions of law which because of their great importance should be settled by this Court and which is in conflict with decisions of other Circuit Courts involving the same principles and in which decision questions have been decided in a way probably in conflict with applicable decisions of this Court.

And the petitioner respectfully shows:

First: That she is a resident of the City of Milwaukee, County of Milwaukee, State of Wisconsin, within the judicial district of the District Court for the Eastern District of Wisconsin.

Second: That in June, 1925, the government instituted an action in said District Court for cancellation of a certificate of naturalization granted this petitioner February 11, 1924, which said action was decided adversely to the government (13 F. (2d) 662); that an appeal was then taken to said Circuit Court of Appeals and thereafter said Circuit Court rendered an opinion reversing the decree of said District Court, that said opinion was dissented from by the Senior Circuit Judge, Alschuler, in a written dissenting opinion (21 F. (2d) 28).

Third: That thereafter a timely petition for rehearing was made to and considered by said Circuit Court and denied on September 22, 1927.

Fourth: That the material facts, briefly, are as follows: The Naturalization Act requires the attachment of an "arrival certificate" to the application for naturalization; the application in question was filed November 13, 1923, at which date the arrival certificate had not been received by the applicant or by the Clerk of the District Court from the Naturalization Department of the government; on December 3, 1923, however, the certificate was mailed by the District Director of Naturalization to the Clerk and filed by the

latter. The application, having been duly docketed and notice thereof given as required by law, took its place upon the regular calendar for naturalization hearings and came on for hearing February 11, 1924.

At the time of the hearing, the District Court had before it the application, the applicant, the necessary witnesses, as well as the certificate of arrival.

The Assistant Chief Naturalization Examiner appearing for the government under Section 11 objected to the granting of the application, upon the sole ground that the arrival certificate had not been actually attached to the application November 13, 1923. The Court, being advised of the facts, ordered the attachment of the "arrival certificate" to the application, nunc pro tunc as of the date of filing the petition, denied the government's motion and granted a certificate of naturalization to the applicant, the petitioner herein.

No appeal was taken by the government from the decree of naturalization.

Fifth. That in June, 1925, the government instituted an independent action by virtue of Section 15 of the Naturalization Act to set aside the certificate of naturalization so granted, on the ground that the same had been "illegally procured," the alleged illegality consisting of the amendment of the application for naturalization by annexing thereto the certificate of arrival supplied by the District Director of Naturalization. On April 2, 1926, the District Court denied the petition of the government for a cancellation of the certificate and rendered an opinion in support of this conclusion (13 F. (2d) 662).

Sixth. That a certified copy of the transcript of record of the case accompanies this petition and copies of the opinions rendered below are hereto annexed.

Seventh. That your petitioner is advised by counsel and believes that this case presents questions of great importance which should be passed upon by this court because:

1. The decision seriously jeopardizes the rights of numerous naturalized citizens whose naturalization proceedings included orders by the trial court amending applications for naturalization so as to cure alleged procedural defects. The decision makes it possible to annul naturalization judgments at any time, by decrees rendered in later independent actions instituted by the government under Section 15 of the Act, despite the conceded qualifications of the persons affected, regardless of the absence of fraud in the proceedings, and though the amendments merely affect purely procedural matters and not matters of substance.

2. The decision tends to deprive the United States District Courts and other naturalization courts, numbering over 2280 throughout the country, of the right to act in a judicial capacity in passing upon naturalization petitions, of exercising the inherent power in their discretion of amending applications curing or waiving minor procedural requirements.

Eighth. That your petitioner is advised by counsel and believes that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this court in that

1. The decision of the lower court, in effect, makes the naturalization court an administrative functionary without the right to exercise judicial powers, especially that of amendment, whereas this Honorable Court has held in *Tutun vs. United States*, 270 U. S. 568, that the proceeding is judicial.

2. The decision apparently contemplates that under Section 15 of the Naturalization Act the government has the right to bring a separate action for cancellation of the certificate of naturalization for any reason or ground whatever, whether the defect be procedural or substantive, whereas this court has held in *Luria v. United States*, 231 U. S. 24, that Section 15 is not intended to "make any act fraudulent or illegal that was honest and legal when done," but is solely for the purpose of setting aside "of merely colorable letters of citizenship to which their possessors never were lawfully entitled."

Whereas the decision of the Circuit Court of Appeals holds that a procedural defect, properly reviewable by appeal from the decree of naturalization, may be reviewed under Section 15, this Court has indicated in the *Tutun* case that the "remedy afforded to the government by Section 15 is narrower in scope than the review commonly afforded by appellate courts."

3. The decision of the Circuit Court of Appeals apparently contemplates that the granting of a decree of naturalization upon an amended application conforming with the facts existing at the time of the decree, or waiving or curing alleged procedural defects in the face of opposition by the government, from which decree no appeal has been taken, does not con-

stitute res judicata in an action brought under Section 15, whereas this Court has held in *United States v. Ness*, 245 U. S. 326, that "a decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it enter an appearance under Section 11," and it is assumed that the same ruling would apply as to Federal Courts of naturalization.

Sixth: That your petitioner is advised by counsel and believes that the decision of the Circuit Court of Appeals announces a rule in conflict with the decisions of other circuit courts on the same matter in that the decision construes a defect in procedure, ordinarily reviewable by an appeal, as constituting illegality under Section 15, which is in conflict with decisions, among others, of the 3rd Circuit in *United States v. Richmond*, 7 F. (2d.) 28. The decision here in question on general principles is in conflict with the decison of the 9th Circuit in *United States v. Pandit*, 15 F. (2d.) 285, (from which latter decision this Court has denied a petition for writ of certiorari).

Seventh: That of the four judges who have heard and passed upon the case at bar, two have sustained the position of the government and two (the District Judge and the Senior Circuit Judge) have sustained this petitioner's contentions.

Eleventh: That in support of her contentions, your petitioner refers to the annexed brief which is made a part hereof.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States

Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, and that your petitioner have such further relief in the premises as to this Court may seem appropriate and in conformity with said Act.

And your petitioner will ever pray, etc.

Dated, November 30, 1927.

ANNA MARIE MANEY

BRUNO V. BITKER,
Counsel for Petitioner.

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UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN, ss
STATE OF WISCONSIN,
COUNTY OF MILWAUKEE.

ANNA MARIE MANEY, being duly sworn, says:

That she is the above named petitioner; that she has read over the foregoing petition and knows the contents thereof, and the facts as stated therein are true to the best of her knowledge, information and belief.

Anna Marie Maney

Subscribed and sworn to before me

this 2nd day of December, 1927.

(Seal)

Eileen E. Keck

Notary Public, Milwaukee County, Wisconsin.

My commission expires June 5, 1930

CERTIFICATE OF COUNSEL.

We, and each of us hereby certify that in our opinion the foregoing petition for a writ of certiorari is well founded in law.

BRUNO V. BITKER,
Counsel for Petitioner.

EDWIN S. MACK,
Of Counsel for Petitioner.

Supreme Court of the United States

October Term, 1923

No. ——

ANNA MARIE MANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF.

This case involves the following questions:

1. Whether the United States District Court in naturalization proceedings has the power, in the exercise of its judicial discretion, to permit to be supplied by amendment from the public records in the control of the Bureau of Naturalization, the omission from an application for naturalization so as to remedy a purely procedural matter.

2. Whether, after the government has appeared at the original hearing in the naturalization proceedings, pursuant to Section 11 of the Naturalization Act and has objected to the granting of a decree on a procedural ground, but has failed to appeal therefrom, it may, nevertheless, at any time thereafter file a bill under Section 15 of the Naturalization Act to set aside the decree of naturalization on the theory that the alleged procedural defect constitutes illegality.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI.

1. *THE IMPORTANCE OF THE QUESTIONS INVOLVED*

The importance of the questions involved may be best characterized in the language of the first paragraph of the dissenting opinion of Alschuler, Circuit Judge:

"The principle declared in this opinion is far reaching. Its general application would subject to such collateral attack every naturalization certificate granted since the act was adopted, however in good faith granted and received, where it is shown there was in the proceedings any departure from formal procedural statutory provisions, however trivial and inconsequential, and which by no possibility did or could affect the merits."

It is unquestioned that in the thousands of naturalization petitions which come before the courts annually, the courts, acting judicially, permit amendments of their allegations to conform with the actual facts and enter orders curing minor procedural errors or omissions. To permit a timely appeal by the government, based on such minor defects, is one thing, but it is an entirely different matter and one of the most serious consequence to the naturalized citizens of this country to rule that the government may at any time annul a decree of naturalization, free from fraud or any substantive shortcoming, because of a mere informality or irregularity in procedure from which no appeal was taken.

2. *THE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.*

A. *A Naturalization Case is a Judicial Proceeding.*

The effect of the ruling of the majority in the Circuit Court of Appeals is to deny that the District Court acts judicially in passing upon naturalization cases, deciding rather that it acts in an administrative capacity only. The decision binds the District Court inexorably by the letter of the law and deprives the Court of power to determine judicially what procedural requirements are mandatory and what regulatory, or to decide whether a formal or procedural defect may be cured by amendment in conformity with the facts existing at the time of the hearing.

This is contrary to the spirit of

Johannessen v. United States, 225 U. S. 227
Tutun v. United States, 270 U. S. 568.

B. *The Trial Court Had Jurisdiction of Naturalization Petition in This Case.*

Further, the court below has apparently ruled that the District Court was without jurisdiction to hear and pass upon the application because "its preparation, filing and presentation shall be in exact accordance with the provisions of the act, and not otherwise, before there is any power in the court to act upon it."

The petition to be admitted to citizenship is a judicial proceeding under a federal statute. It, therefore, "presents a case within the jurisdiction of the court and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an

issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven."

Binderup v. Pathe Exch., 263 U. S. 291, 305.

"Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction. If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction."

General Investment Co. v. New York Central R. R. Co., 271 U. S. 228.

In short, if the applicant has presented a petition setting forth substantially a case within the jurisdiction of the court, as is a naturalization case, the District Court acquired jurisdiction. As was said in the *Johannessen* case:

"There is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. * * * *"

If the petition had been so unsubstantial as to be without color of merit, a jurisdictional question might arise. But in view of the cases cited in this court, the ruling of the Circuit Court of Appeals that the District Court was without power to act either way upon the application seems clearly erroneous.

3. *THE POWER OF THE GOVERNMENT UNDER SECTION 15.*

Section 15 permits an independent suit to set aside a decree of naturalization when it was "illegally procured." The qualifications of the applicant in this case are conceded by the government and the sole basis for the action is the technical defect referred to in the petition. It is this defect which the court below deems so unlawful as to mark the decree as having been "illegally procured," even though the Government, from its records, supplied the omitted arrival certificate which the District Court permitted to be annexed to the application.

This interpretation seems contrary to the spirit of *Luria v. United States*, 231 U. S. 9, in which it is said of Section 15:

(231 U. S. 24) "It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship to which their possessors never were lawfully entitled."

Certainly it cannot be said that the District Court in exercising its discretion in passing upon the petitioner's application for citizenship was aiding her to obtain "ill gotten privileges," to use the phrase employed in *Johannessen v. United States*, 225 U. S. 227, at 242. So to hold is to exaggerate technicality and to disregard the truth.

4. THE PHRASE "ILLEGALLY PROCURED" DOES NOT APPLY TO PROCEDURAL IRREGULARITIES, OBJECTED TO AT THE ORIGINAL HEARING, BUT WHICH WERE NOT SOUGHT TO BE REVIEWED BY THE GOVERNMENT.

Mr. Justice Brandeis said in the *Tutun* case that:

> (270 U. S. 579) "The remedy afforded to the Government by Section 15 is narrower in scope than the review commonly afforded by the appellate courts. Moreover there is no corresponding provision which would afford to the applicant for citizenship an independent remedy for correcting errors committed in the District Court."

Again in the *Ness* case it was said:

> (245 U. S. 326) "Opposition to the granting of the petition for naturalization may prevail under Section 11 because of objections to the petitioner, or weight of evidence, or the credibility of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States, if it enter an appearance under Section 11."

In view of this language, to hold that an erroneous decision by a United States District Court on a question of procedure may be vacated by an independent action under Section 15, though binding on the government, if made in a State Court of naturalization, is, in effect, to hold that the latitude permitted by the *Ness* case to State Courts is greater than that permitted to Federal Courts of naturalization. In the language of the District Court in this case:

> (13 F. 2d, 666) "It would be absurd to endow the former (State Courts) with power to make a binding ruling on such matters and thereby withdraw from the situation the possibility of attack

under Section 15, but to reserve to the government the right to appear in the federal courts and instead of being bound by a decision therein on minor procedural matters to have liberty to proceed under Section 15 with the confidence of proving the guilty." (Parentheses ours)

5. *CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS.*

The spirit of the prevailing opinion below appears not only in conflict with applicable decisions of this Court, but is, in principle, in conflict with decisions of the Circuit Courts of Appeals in other circuits.

Particular attention is called to *United States v. Richmond*, 17 F. (2) 28, (3rd C. C. A.), decided January 13, 1927, in which the recent decisions of this Court are reviewed and distinguished. There the Court in interpreting the phrase "illegally procured" and distinguishing between a certificate obtained by an affirmative unlawful act calling for the exercise of power under Section 15 and one obtained through an irregularity in procedure correctible on appeal, says:

(17 F. 2d) 31) "In the absence of an authoritative and controlling decision otherwise construing the term 'illegally procured,' we are inclined to the view that the decree of the Court in this case—'mistakingly made as it possibly was'—was not 'illegally procured' within the meaning of this statute, but was an irregularity in procedure correctible on appeal and presented a situation the statute was not meant to cover. Bearing on that question, we note that the United States, by virtue of Section 11 of the Act of 1906 was, by its representative, the naturalization officer, represented and in court when Richmond's petition was heard; that by that statute it was given the right

to be heard in opposition to the granting of any petition in naturalization; that it knew of the decree which was entered by the judge, and in pursuance of such decree and reciting it as its ground for doing so, it subsequently, by its naturalization bureau, issued to Richmond his and its certificate on such decree.

"The United States, being present and, therefore, a party with a litigant's rights in this naturalization proceeding, had the right to object to any error or irregularity and, if dissatisfied with the decree, to appeal therefrom."

Attention is called, too, to *United States v. Pandit*, 15 F. (2d) 285, (9th C. C. A.), in which that Court says, citing the *Tutun* case for its authority, that:

(15 F. (2d) 286) "It would scarcely be contended that the intent of the Congress was to grant a new trial except in ex parte cases where a final judgment is entered, when the law provides a remedy enforcible in the courts according to the regular course of legal procedure, and the remedy pursued and a status decreed. The Supreme Court in *Tutun v. United States* said:

> 'Whenever the law provides a remedy enforcible in the courts according to the regular course of legal procedure and that remedy is pursued, there arises a case within the meaning of the constitution whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character.'

The judgment being final in a proceeding according to the regular course of law, the giving of Section 15 unlimited scope would, in effect, grant a new trial at the government's election * * *

Courts often speak of erroneous rulings and always as meaning such as deviate from or are contrary to the law, but the term 'erroneous' is

never used by courts or law-writers as designating a corrupt or evil act.

By the same token erroneously granting naturalization to the defendant, the right to citizenship having distinctly been put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, the judgment not having been modified or reversed, cannot now be disputed."

In *United States v. Solomon (D. C.)*, 231 F. 462, and affirmed (C. C. A. 5th Cir.) 231 F. 928, the court says:

"Irregularity is not synonymous with illegality. Illegality denotes a radical defect, while irregularity is a want of adherence to some prescribed rule or mode of proceeding."

The cases cited from the Circuit Courts of Appeals are referred to not only as indicating the diversity of opinion among the circuits named, but because it is believed that the conclusions arrived at in other circuits are more in keeping with the spirit of the law than the decision in this case now sought to be reviewed, which represents an equal division among the four judges who have passed upon it.

It is respectfully submitted that the writ of certiorari prayed for should be granted.

BRUNO V. BITKER,
Counsel for Petitioner.

EDWIN S. MACK,
LOUIS MARSHALL,
Of Counsel.

APPENDIX

STATUTES INVOLVED

Naturalization Laws—Act of June 29, 1906.
(34 Stat. L., Part. 1, p. 596).

SECTION 4, Clause Second, Last Paragraph—

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Sec. 11. That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to insti-

tute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal service in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

(First Paragraph Only)